IN THE

Supreme Court of the United States

—o—

No. .....

—o—

A. J. MATTHEWS, as Trustee,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

—o—

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE CIRCUIT COURT OF APPEALS

—o—

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, A. J. Matthews, as Trustee, respectfully represents that:

122639

The petition in the case at bar to condemn the easement for flowage rights over petitioner's lands lying in the Birds Point-New Madrid Floodway was filed under authority of the Secretary of War (Rec. 3).

The Birds Point-New Madrid Floodway, in which said lands lie was created under authority of Congressional Act passed May 15, 1928, a part of which Act was the Jadwin Plan, contained in House Document No. 90, 70th Congress, First Session. This Act is found in 33 U. S. C. A. Secs. 702a to 702n. (Rec. 3-4.)

Prior to the filing of this condemnation suit, and on January 14, 1932, respondent, United States of America, made written offers to petitioner to purchase the easement for flowage rights over the lands involved in this cause, and on February 26, 1932, and within the time agreed upon, petitioner, in writing, in form provided by the United States of America, accepted the offers made to purchase the said easement. (Rec. 193-223).

On April 22, 1932, the United States of America, by letter, attempted to withdraw the offers which had been made, and submitted an offer in a nominal amount. (Rec. 223-224).

On June 4, 1932, petitioner, by letter, refused to accede to the withdrawal of the prior offer which had been made and accepted, and refused to accept the nominal offer made. (Rec. 189-190).

On June 25, 1932, petitioner filed suit in the Court of Claims, seeking to collect from the United States of America the amount of the offer which was accepted. The Government filed demurrer and on April 10, 1933, a voluntary non-suit was taken and on the same date petitioner filed suit in the Court of Claims under the Tucker Act, seeking to recover the value of the easement which had been taken. (Rec. 46). Following this, and on August 17, 1933, condemnation suit in the case at bar was filed in the United States District Court for the Eastern District of Missouri, seeking to condemn the easement for flowage rights over petitioner's lands lying in the Birds Point-New Madrid Floodway.

On October 9, 1933, (Rec. 1) petitioner filed pleading in this cause. (Rec. 21) as a result of which the Court entered an order holding in abeyance the condemnation action until the determination of the suit which had been filed in the Court of Claims April 10, 1933; and from court to court, upon motion of the United States of America, the order holding condemnation suit in abeyance and the appointment of commissioners was kept in effect. (Rec. 75).

On May 31, 1938, the Court of Claims adjudged that there had been no taking of the easement within the meaning of the Fifth Amendment to the Constitution and dismissed the action in that Court for want of jurisdiction. (Rec. 112).

At the April term, 1939, of the said District Court of the United States for the Eastern District of Missouri, petitioner, in the case at bar, filed motion for the appointment of commissioners to assess the value of the easement and the United States of America filed motion to dismiss the condemnation suits, with the right to re-file, —no grounds for dismissal being alleged in the motion. (Rec. 84).

On the 5th day of October, 1939, motion to dismiss the petition to condemn in the case at bar was granted by the District Court (Rec. 87).

After the appeal in the case at bar was perfected to the United States Circuit Court of Appeals for the Eighth Circuit, and after the decision in Danforth v. United States of America, 308 U. S., 271, holding similar contract to purchase easement for flowage rights was binding on the Government in a suit to condemn, and on the 10th day of April, 1940, petitioner herein filed motion in the Circuit Court of Appeals seeking an order permitting him to amend his answer and set up the said con-

tract in the form of a written offer to purchase the easement for flowage rights made by the Government and his written acceptance of that offer (Rec. 183).

All plans for the work of said floodway were approved January 14, 1929, and the work is complete except for the cutting down of the fuseplug section. The flowage rights over all the lands of the floodway, except the lands involved in the present litigation, have been secured by the Government either by purchase or condemnation. The total acreage is approximately 131,000 acres and the total acreage of petitioner's lands is approximately 20,000 acres (Rec. 112-113).

The Floodway Act passed in 1928 not only authorized the condemnation of the easement for flowage rights, but directed and commanded that the easement for flowage rights over the lands in said floodway be condemned. The Jadwin Plan was approved by the President and said Act was passed based upon his recommendation and following its passage, and on December 11, 1928, the President issued an executive order directing that the easement for flowage rights upon all the lands lying in the floodway be either purchased or condemned. It was in conformity to this executive order of the President that the written offer to purchase the easement was made by the Government. (Rec. 186).

The District Court, without written opinion, allowed the motion of plaintiff, United States of America, in this action, to dismiss the suit with right to re-file, upholding the contention of the Government that it had the right to dismiss the condemnation action at any time, regardless of circumstances, prior to a taking of the easement for flowage rights over defendant's lands. (Rec. 87).

The United States Circuit Court of Appeals affirmed the decision of the District Court, ordering the dismissal

of the condemnation action, but made no decision on the motion of appellant (there) Matthews to amend his answer. (Rec. 227-236).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The decision of the Honorable United States Circuit Court of Appeals is in conflict with applicable decisions in this Court, and is in conflict with principles of law established by decisions of this Court.

II.

The holding of the United States Circuit Court of Appeals was contrary to the principles of law established by this Court, because:

(a) The United States of America has no right to dismiss the condemnation suit, under the facts in the case at bar, since such dismissal is contrary to the established principle of law that there is no right to dismiss with right to re-file when suit is brought under a statute directing and commanding that condemnation be had and that there is no right to dismiss a condemnation action when the project in which the lands lie is not to be abandoned.

(b) The written offer made by the Government to purchase the easement for flowage rights over petitioner's lands, and his acceptance of same prior to the filing of the suit, became binding upon the Government when the suit at bar was filed to condemn the easement for flowage rights over plaintiff's lands for the purchase of which the contract had been made, and barred any right to dismiss the condemnation petition.

(c) The motion of appellant (there) A. J. Matthews, Trustee, filed in the United States Court of Appeals for leave to amend his answer alleging the written offer by the United States to purchase the easement for flowage rights over his lands, and acceptance of same by him, should have been granted; and the motion made by Matthews in the District Court for the appointment of commissioners to assess the value of the easement sought to be condemned should have been granted.

(d) Dismissal of the condemnation suit discriminates against appellant, in that the easement for flowage rights over his lands will be taken without compensation to him; whereas, the easement for flowage rights over all the lands in the floodway and in the same situation, within said floodway, as petitioner's land have been paid for by the Government either through purchase or by condemnation.

III.

The United States Court of Appeals has decided the question relating to the construction and application of a statute of the United States erroneously and which has not been, under facts similar to those in this case, settled, but should be settled by this Court.

WHEREFORE, Petitioner prays:

That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring said Circuit Court of Appeals to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all other proceedings of said Circuit Court of Appeals in this case, styled A. J. Matthews, as Trustee, Appellant vs United

States of America, Appellee, No. 11,694 Civil, to the end that said cause may be reviewed and determined by this Court, as provided by law.

Petitioner further prays that said judgment of said Circuit Court of Appeals be reversed.

SAM COSTEN,

Attorney for Petitioner.

Union Planters Nat'l. Bk. Bldg.

Memphis, Tenn.

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